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Southern Bank Bhd v Ng Keng Lian & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–78 OF 2000
FAIZA TAMBY CHIK J
26 SEPTEMBER 2001

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Labour Law *— Employment — Dismissal — Constructive dismissal — Employee made representation before informing employer of constructive dismissal — Whether representation was premature — Whether employee obliged to inform employer that she had been constructively dismissed before she made representation — Industrial Relations Act ss 20(1) & (1A)*

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Labour Law *— Industrial Court — Award — Representation made prematurely by employee under Industrial Relations Act 1967 — Whether Industrial Court acted in error of law and in excess of jurisdiction when it decided that employee's claim not premature — Whether decision of Industrial Court was unreasonable in the 'Wednesbury sense'*

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The first respondent was employed as the applicant's branch manager. The first respondent was informed on 19 August 1998 regarding investigations that were carried out by the applicant involving her. As a result of the investigations, the first respondent was suspended on 26 August 1998 for serious allegations of misconduct. The applicant then issued show cause letters to the first respondent on 9 September and 18 September 1998. On 19 September 1998, the first respondent made a representation under s 20(1) of the Industrial Relations Act 1967 ('the IRA') that she had been dismissed on 7 September 1998. Notwithstanding the fact that she had purportedly considered herself as having been dismissed on 7 September 1998, the first respondent replied to the applicant's show cause letters on 20 September 1998 in which she denied all allegations made against her. In that letter of 20 September 1998, no mention was made by the first respondent that she had considered herself as having been constructively dismissed or that she had made representation under IRA. Then, on 25 September 1998, the first respondent wrote to the applicant to state that she had considered herself as constructively dismissed and that representation had been made under the IRA. At the Industrial Court, the applicant contended that a representation by an employee under the IRA that she had been constructively dismissed before her employer had been informed was a premature representation and accordingly, the Industrial Court would not be seized with jurisdiction to adjudicate the claim of constructive dismissal. The Industrial Court found that the claim was not premature. The Industrial Court further decided that the first respondent was not obliged in law to inform the applicant of her stand that she had been constructively dismissed before she made the representation under the IRA. This application made by the applicant raised the issue of whether an employee, who considered herself as having been constructively dismissed, was obliged to first inform her

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employer or put her employer on notice of her stand that she had been constructively dismissed before she could make a representation under s 20(1) of the IRA, read with s 20(1A) thereof. A

Held, allowing the application:

(1) Under s 20(1) of the IRA, a workman must first be 'dismissed' without just cause and excuse before he may make representations to the Director General of the Industrial Relations. There must therefore, be an act or event amounting to a dismissal of the employee and only then would he have the right under statute to make the requisite representation. The legislative intent that there should be a dismissal before the representation was also found in s 20(1A) of the IRA, which required the representation to be made 'within 60 days of the dismissal'. Those provisions clearly prescribed the 'dismissal before representation' formula. Accordingly, where a representation was made before or preceded the dismissal, the dismissal would in law be premature and the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal based on the representation (see p 566F–I). B C D

(2) The Industrial Court acted in error of law and in excess of jurisdiction when it decided that the first respondent's claim was not premature. The Industrial Court failed to take into account the undisputed facts that: (a) there was no document or letter from the first respondent where she took the stand that she had been constructively dismissed on 7 September 1998; (b) the first respondent took the position for the first time that she had been constructively dismissed on 25 September 1998 in her letter of the same date; (c) the first respondent's conduct in responding to the applicant's show cause letters was inconsistent with her stand that she had been constructively dismissed on 7 September 1998; and (d) the first respondent continued to occupy the residential premises provided by the applicant and continued to receive salaries well after 7 September 1998. Those facts vitiated the finding that the first respondent was constructively dismissed on 7 September 1998 (see pp 568A–569A). E F G

(3) Therefore, the Industrial Court's finding that the first respondent had deemed herself as having been constructively dismissed on 7 September 1998 was an erroneous factual conclusion on the totality of the evidence placed before it. It was also a conclusion that was not reasonably supported by the evidence taken as a whole. On either base, the finding was unsustainable (see p 569F–G). The Industrial Court should have found that the first respondent's purported constructive dismissal was with effect from 25 September 1998 and that her representation on 19 September 1998 was premature as the same ante-dated her claim of constructive dismissal. It was therefore open to the Industrial Court to hold that it did not have jurisdiction to hear the first respondent's premature claim and the claim ought to H I

A have been struck off in limine. Its failure to do so was an error of law (see p 570C–E).

(4) Even under the common law contract test, it was a legal requirement in constructive dismissal cases for the employee to inform the employer that she deemed herself as having been B constructively dismissed before she initiated any action against the employer (see p 573E). Therefore the approach to be taken by the Industrial Court should be to ask itself whether under the common law contract test, there was a duty on the employee to inform her employer that she deemed herself as having been constructively dismissed before she made the representation. The C Industrial Court's failure to distil the correct principles and to apply them to the issue before it by asking itself the correct question was patently an error of law (see p 572G–H).

(5) Accordingly, when the first respondent made the representation on 7 September 1998 without having first informed the applicant D of her stand, she could not in law claim to have been constructively dismissed. Her claim was only with effect from 25 September 1998, by which time she had made the representation. The representation was therefore premature. The Industrial Court did not properly direct itself on the law when it decided that there was no duty on the part of the first respondent E to inform her employer that she considered herself as having been constructively dismissed before she made the representation. The decision of the Industrial Court was therefore unreasonable in the 'Wednesbury sense'. The decision could not be sustained and must be quashed (see pp 574G–I, 575F).

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[Bahasa Malaysia summary

Responden pertama telah diambil bekerja sebagai pengurus cawangan pemohon. Responden pertama telah dimaklumkan pada 19 Ogos G 1998 berhubung siasatan yang dijalankan oleh pemohon yang melibatkan beliau. Pemohon kemudian telah mengeluarkan surat-surat tunjuk sebab kepada responden pertama pada 9 September dan 18 September 1998. Pada 19 September 1998, responden pertama membuat satu representasi di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('APP') bahawa beliau telah dipecat pada H 7 September 1998. Meskipun pada hakikatnya beliau telah beranggapan bahawa beliau telah dipecat pada 7 September 1998, responden pertama menjawab surat-surat tunjuk sebab pemohon pada 20 September 1998 di mana beliau menafikan semua dakwaan yang dibuat terhadap beliau. Di dalam surat 20 September 1998, tiada disebutkan oleh responden pertama bahawa beliau menganggap I diri beliau telah dipecat secara konstruktif atau bahawa beliau telah membuat representasi di bawah APP. Kemudian, pada 25 September 1998, responden pertama telah menulis kepada pemohon untuk

menyatakan bahawa beliau telah menganggap diri beliau dipecat secara konstruktif dan bahawa representasi tersebut telah dibuat di bawah APP. Di Mahkamah Perusahaan, pemohon menghujahkan bahawa satu representasi oleh seorang pekerja di bawah APP di mana beliau telah dipecat secara konstruktif sebelum majikan beliau dimaklumkan adalah satu representasi yang pra masa dan sewajarnya, Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mengadili tuntutan pemecatan konstruktif tersebut. Mahkamah Perusahaan mendapati bahawa tuntutan tersebut bukan pra masa. Mahkamah Perusahaan selanjutnya memutuskan bahawa responden pertama tidak wajib di sisi undang-undang untuk memaklumkan pemohon tentang pendirian beliau bahawa beliau telah dipecat secara konstruktif sebelum beliau membuat representasi di bawah APP. Permohonan yang dibuat oleh pemohon ini menimbulkan persoalan sama ada seorang pekerja, yang menganggap beliau telah dipecat secara konstruktif, diwajibkan untuk terlebih dahulu memaklumkan majikan beliau atau memberi notis kepada majikan beliau tentang pendirian beliau bahawa beliau telah dipecat secara konsruktif sebelum beliau boleh membuat representasi di bawah s 20(1) APP, dibaca bersama s 20(1A) yang sama.

Diputuskan, membenarkan permohonan tersebut:

(1) Di bawah s 20(1) APP, seorang pekerja mesti dipecat tanpa sebab atau alasan yang munasabah sebelum beliau dapat membuat representasi kepada Ketua Pengarah Perhubungan Perusahaan. Mesti terdapat suatu tindakan yang membawa kepada pemecatannya pekerja tersebut dan setelah itu, barulah beliau mempunyai hak di bawah undang-undang untuk membuat representasi tersebut. Niat badan perundangan bahawa sepatutnya terdapat pemecatan sebelum representasi juga terdapat di dalam s 20(1A) APP, yang menyatakan bahawa representasi tersebut dibuat 'within 60 days of the dismissal'. Peruntukan-peruntukan tersebut jelas memperuntukkan formula 'dismissal before representation'. Maka, di mana representasi dibuat sebelum pemecatan tersebut, pemecatan tersebut akan menjadi pra masa di sisi undang-undang dan Mahkamah Perusahaan tidak akan mempunyai bidang kuasa untuk mendengar tuntutan pemecatan tersebut berdasarkan representasi tersebut (lihat ms 566F–I).

(2) Mahkamah Perusahaan telah bertindak dalam kekhilafan undang-undang dan melampaui bidang kuasanya semasa memutuskan bahawa tuntutan responden pertama tidak pra masa. Mahkamah Perusahaan gagal mengambil kira fakta-fakta yang tidak dipertikaikan bahawa: (a) tiada dokumen atau surat daripada responden pertama di mana beliau mengambil pendirian bahawa beliau telah dipecatkan pada 7 September 1998; (b) responden pertama mengambil kedudukan untuk pertama kali bahawa beliau telah dipecat secara konstruktif pada 25 September 1998

A dalam surat beliau pada tarikh yang sama; (c) perbuatan responden pertama yang menjawab surat-surat tunjuk sebab pemohon adalah tidak konsisten dengan pendirian beliau bahawa beliau telah dipecat secara konstruktif pada 7 September 1998; dan (d) responden pertama masih terus menetap di premis perumahan yang diperuntukkan oleh pemohon dan masih terus B menerima gaji selepas 7 September 1998. Fakta-fakta berikut menjadikan penemuan tidak sah di mana responden pertama telah dipecat secara konstruktif pada 7 September 1998 (lihat ms 568A–569A).

(3) Oleh itu, penemuan Mahkamah Perusahaan bahawa responden C pertama menganggap diri beliau telah dipecat secara konstruktif pada 7 September 1998 adalah satu kesimpulan fakta yang salah berdasarkan keseluruhan keterangan yang dihadapkan. Ia juga adalah satu kesimpulan yang tidak disokong secara munasabah oleh keterangan pada keseluruhannya. Dalam mana-mana keadaan, penemuan tersebut tidak boleh dikekalkan (lihat D ms 569F–G). Mahkamah Perusahaan sepatutnya mendapati bahawa pemecatan secara konstruktif responden pertama mula berkuatkuasa pada 25 September 1998 dan bahawa representasi beliau pada 19 September 1998 adalah pra masa kerana representasi tersebut adalah sebelum tuntutan pemecatan secara konstruktif beliau. Adalah terbuka untuk Mahkamah Perusahaan E memutuskan bahawa ia tidak mempunyai bidang kuasa untuk mendengar tuntutan pra masa responden pertama dan tuntutan tersebut sepatutnya dibatalkan in limine. Kegagalannya untuk berbuat demikian adalah satu kesilapan undang-undang (lihat ms 570C–E).

F (4) Oleh itu, di bawah ujian kontrak common law, adalah satu keperluan di sisi undang-undang dalam kes-kes pemecatan secara konstruktif untuk pekerja tersebut memaklumkan majikan bahawa beliau menganggap diri beliau telah dipecat secara konstruktif sebelum beliau memulakan apa-apa tindakan terhadap majikan tersebut (lihat ms 573E). Mahkamah G Perusahaan sepatutnya menerapkan ujian tersebut bagi tujuan menetukan persoalan yang dihadapkan. Dengan berbuat demikian, pendekatan yang diambil oleh Mahkamah Perusahaan sepatutnya adalah untuk menanya sendiri sama ada dalam ujian kontrak common law, terdapat kewajipan ke atas pekerja untuk H memaklumkan majikan bahawa beliau menganggap diri beliau telah dipecat secara konstruktif sebelum beliau membuat representasi. Kegagalan Mahkamah Perusahaan untuk menyarikan prinsip-prinsip yang betul dan menerapkan prinsip-prinsip tersebut kepada persoalan yang dihadapkan dengan menanyakan sendiri persoalan yang betul adalah nyata satu I kesilapan undang-undang (lihat ms 572G–H).

(5) Sewajarnya, apabila responden pertama membuat representasi pada 7 September 1998 tanpa terlebih dahulu memaklumkan

pemohon tentang pendirian beliau, beliau tidak boleh di sisi undang-undang menuntut telah dipecat secara konstruktif. Tuntutan beliau hanya berkuatkuasa pada 25 September 1998, iaitu pada masa beliau membuat representasi tersebut. Representasi tersebut oleh demikian adalah pra masa. Mahkamah Perusahaan tidak mengarahkan dirinya dengan betul atas undang-undang apabila ia memutuskan bahawa tidak terdapat apa-apa kewajipan di pihak responden pertama untuk memaklumkan kepada majikan beliau bahawa beliau menganggap beliau telah dipecat secara konstruktif sebelum beliau membuat representasi tersebut. Keputusan Mahkamah Perusahaan oleh demikian adalah tidak munasabah mengikut ujian 'Wednesbury'. Keputusan tersebut tidak boleh dikekalkan dan patut dibatalkan (lihat ms 574G–I, 575F).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 813–832.

For cases on award of the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1178–1214.

Cases referred to

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh s/o Chingar Singh [2000] 3 MLJ 714 (refd)

Amanah Butler v Yike Chee Wah [1997] 1 MLJ 750 (refd)

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Chirstoph Hoelzl v Langkawi Island Resort Sdn Bhd [1998] 6 MLJ 162 (refd)

Edwards v Surrey Police (1999) IRLR 456 (refd)

Funai Electric (M) Sdn Bhd v Saliah bte Ahmad [2000] MLJU 132 (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1994] 3 MLJ 369 (refd)

Holland v Glendale Industries Ltd [1998] 1 ICR 493 (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh [1997] 1 MLJ 789 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (refd)

A *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 CLJ 475 (folld)
Pexxon Sdn Bhd v Sia Qui Yau, Johor (1989) 1 ILR 235 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
B *SP Tiwari v State of Bihar* 1993 II LLJ 1162 (refd)
Shaw Computers [1989] 1 ILR 261 (refd)
Supermix Concrete (M) Bhd v Teoh Boon Beng [1978] 1 ILR 274 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ
C 92 (folld)
Wong Yuen Hock v Syarikat Hong Leong Assurance [1995] 2 MLJ 753 (refd)

Legislation referred to

D Court of Judicature Act 1964 s 25
Industrial Relations Act 1967 ss 20(1), 20(1A)

Steven Thiru (*B Anushana* and *S Nanthabalan* with him) (*Shook Lin & Bok*) for the applicant.
V Rajasingam (*Raja Singam & Co*) for the respondent.

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Faiza Tamby Chik J: This application (encl 8) raises a very fundamental issue in employment law. It concerns basic principles to be applied in cases of constructive dismissal. The issue may be cast as follows: is an employee, who considers herself as having been constructively dismissed, obliged to first inform her employer or put her employer on notice of her stand (that
F she has been so dismissed) before she can make a representation under s 20(1) of the Industrial Relations Act 1967 ('the IRA') read with s 20(1A) of the IRA?

It was contended before the Industrial Court (the second respondent) on a preliminary objection, that a representation by an employee (under
G s 20(1) read with s 20(1A) of the IRA) that she was constructively dismissed before she informed her employer of her stand, was a premature representation and, accordingly, the Industrial Court would not be seized with jurisdiction to adjudicate the claim of constructive dismissal based on the premature representation. The Industrial Court, however, answered the issue in the negative when it decided that an employee is not required to
H inform her employer that she considered herself as having been constructively dismissed before making the representation under s 20(1) read with s 20(1A) of the IRA. The Industrial Court therefore found that the claim was not premature and refused the applicant's preliminary objection. If the Industrial Court is correct in its view, then any employee can walk out of employment for whatever reasons (eg for a better job)
I without first informing her employer or giving notice to her employer and then when things do not go the employee's way, the employee can say that he or she was in fact constructively dismissed by the employer. This would

be an abuse of a claim of constructive dismissal. Equally, as the case before the court here, an employee faced with serious allegations of misconduct could give the impression that she is submitting to the disciplinary process of the employer. But at the same time, she could make a representation under the IRA that she has been constructively dismissed by reason of the disciplinary process, without first informing her employer of her stand. It is only when she finds that the disciplinary action is not going her way that she informs her employer that she considers herself as having been constructively dismissed and that she had already made her representation. This is also an abuse of a genuine claim of constructive dismissal.

The issue has wide ramifications. It strikes at the very heart of the statutory regime housed in s 20(1) and 20(1A) of the IRA which gives the Industrial Court jurisdiction to hear dismissal cases. The decision of the Industrial Court on the issue is also, as may be seen later, incompatible with the contract test in constructive dismissal cases as postulated in the leading Supreme Court case of *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92. The matter therefore resolves itself into a very important issue of jurisdiction of the Industrial Court in constructive dismissal cases under s 20(1) and 20(1A) of the IRA. Hence, the instant application. The application (encl 8) is supported by the statement (encl 7) and the affidavit of Sunny Lim (encl 6). The first respondent has filed and served one affidavit in reply affirmed on 4 July 2001 and in response to that, the applicant filed and served its affidavit affirmed on 20 July 2001.

The background facts of the case are as follows: the first respondent was employed as a branch manager of the applicant bank at all material times. The first respondent was informed on 19 August 1998 of the investigations that the bank was carrying out at her branch in Kuala Terengganu involving her (see p 90, encl 6). The second respondent agreed to go on leave from 20 to 30 August 1998 to facilitate the investigations (see p 90 and pp 116–117, encl 6). As a result of the investigations, the first respondent was suspended on 26 August 1998 for serious allegations of misconduct (see pp 118–119, encl 6). The first respondent duly accepted the suspension on 1 September 1998 (see p 120, encl 6). The sequence of events set out above are borne out in the applicant's letter issued by its Manager (Branch Operations), En Mohd Osman at p 90, encl 6. The material part reads as follows:

> The meeting that you had with Mr N Selvarajah, Mr Tay Boon Kuan and me on 19 August 1998 in Kuala Lumpur was for the purpose of informing you of the preliminary results of the investigation and to seek your explanation in respect of your alleged misconduct and breach of ethical practices inconsistent with a branch manager. In fact, you have verbally admitted to some of the wrongdoings. There were no threats of any kind that were made against you at that meeting. As investigations have not been completed, you were offered the option of going on leave instead of a suspension so that you may not be embarrassed. You have voluntarily agreed to our suggestion and submitted the bank's application form for leave on 19 August 1998. Your suspension on

> 26 August 1998 was subsequently deemed necessary as further investigations revealed that this course of action was appropriate in light of the severity of your misconduct.

The statements above have not been denied by the first respondent including the fact that she had 'verbally admitted to some of the wrongdoings'. The applicant then issued show cause letters to the first respondent on 9 September 1998 (pp 121–147, encl 6) and 18 September 1998 (pp 148–150, encl 6). Then, and it is very important to note this, on 19 September 1998, the first respondent made a representation under s 20(1) of the IRA to the Industrial Relations Department that she has been dismissed. This is evident from the letter from the department (see pp 26–29, encl 6) where it is stated:

> Representasi untuk diambil balik bekerja di bawah s 20 Akta Perhubungan Perusahaan 1967.
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> Adalah dengan hormatnya dimaklumkan bahawa pada 19 September 1998, jabatan ini telah menerima representasi yang tersebut di atas dari Ms Ng Keng Lian (see p 26, encl 6).

It may also be noted that according to the first respondent, she was dismissed on 7 September 1998. This is found in a later letter of the department (see p 42, encl 6) which is intituled:

> Rujukan ke Mahkamah Perusahaan oleh YB Menteri Sumber Manusia mengenai perkembangan kerja Cik Ng Keng Lian, 1829, Jalan 11, Taman Padang Midin, 21400 Kuala Terengganu, Terengganu oleh Southern Bank Bhd, 104A & B, Jln Sultan Ismail, 20200 Kuala Terengganu pada 7 September 1998.

It is common ground therefore that the first respondent made the representation on 19 September 1998 (where she alleges she was dismissed on 7 September 1998) without first informing or notifying the applicant, her employer, that she considered herself as having been dismissed from employment by the applicant. The Industrial Court accepted this as a fact (see pp 331–334, encl 6). Next, and notwithstanding the fact that she had purportedly considered herself as having been dismissed on 7 September 1998, the first respondent replied to the show cause letters (referred to in para 2.5 above) on 20 September 1998 and states:

> Re: NOTICE TO SHOW CAUSE
> I refer to your letter dated 9 September 1998.
> I deny all allegations contained therein.
> Thank you.
> (See p 30, encl 6).

It may be immediately noted from the first respondent's letter at p 30, encl 6 that she does not state that she considered herself as having been constructively dismissed on 7 September 1998 or that she had already made a representation under the IRA on 19 September 1998. Thus, even as at 20 September 1998 (the date of the first respondent's aforesaid letter at p 30, encl 6), the applicant was completely in the dark and did not know that the first respondent had already considered herself as having been

dismissed by the applicant on 7 September 1998. The applicant also did not know of the first respondent's representation of 19 September 1998. Then, on 22 September 1998, the first respondent wrote again to the applicant but she made no mention of either the purported dismissal or the representation (see p 3, encl 6). As the applicant had no knowledge of the first respondent's stand, it replied to the first respondent's letter of 22 September 1998 (p 31, encl 6) as it would to any of its employee similarly circumstanced (see pp 89–91, encl 6 and pp 153–154, encl 6).

The next important date to note is 25 September 1998. It is the first time the first respondent took the stand that she was constructively dismissed. Her letter of 25 September 1998 at p 22, encl 6 states:

> I refer to your letter dated 22 September 1998 and addressed to me.
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> The manner and mode your goodselves conducted the purported investigations in respect of the purported allegations tantamounts to blatant disrespect and breach of natural justice wherein with due respect I construe that I was dismissed constructively.
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> In the premise, I have made my representation to the relevant ministry wherein in due course your goodselves will be communicated.

Three important points come to the fore from this letter:

(1) she does not state that she had in fact considered herself as having been dismissed by the applicant on 7 September 1998, as she contends now (see also para 3, amended statement of case at p 92, encl 6);

(2) it cannot be denied that this was the first time that the applicant came to know of the first respondent's stand. This is confirmed by the first respondent not denying the following averment of the applicant in para 5, p 14, encl 6:

> I wish to categorically state that at no time whatsoever before her letter of 25 September 1998 (exh SL-1 herein) did the first respondent give notice or inform the applicant of her alleged claim of constructive dismissal. Indeed, the first respondent's conduct at all material times after her said representation on 19 September 1998 and prior to her letter of 25 September 1998 was consistent with her position as an employee of the applicant;

(3) she also confirmed that she had already made the representation. It is therefore beyond doubt that the representation was made before she notified the applicant of her stand that she had been constructively dismissed by the applicant.

The applicant expressed its surprise over the first respondent's belated stand (see pp 159–161, encl 6). At p 160, encl 6, the applicant pointedly noted:

> The bank's efforts in affording you the right to be heard, as stated above, and your conduct in refusing to avail yourself to the opportunity to defend yourself, also as stated above, disentitles you from alleging that there has been a breach of natural justice. At all events, the bank denies breaching any principle of natural justice. Accordingly, your allegation of constructive dismissal, based on the purported breach of natural justice, is misplaced and is also duly denied.

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> Your actions thus far appear to be a deliberate and premeditated attempt on your part to pre-empt and/or prevent a full inquiry into the serious allegations of misconduct made against you. This is also evident from the fact that you chose to lodge a complaint with the Industrial Relations Department (on 19 September 1998) before replying to the show cause letters and further even before your instant allegation of constructive dismissal.

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The first respondent then maintained she had been constructively dismissed 'by your conduct' but again does not state that it was on 7 September 1998 (see p 162, encl 6). The applicant denied the allegation of constructive dismissal and deemed the first respondent's conduct to be a resignation (see pp 184–195, encl 6).

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Two final points to be noted on the equivocal stand of the first respondent in relation to her purported constructive dismissal on 7 September 1998 are as follows:

(1) despite her purported claim of constructive dismissal, the first respondent continued to occupy the residential premises provided to her by the applicant well after 7 September 1998 and even after 25 September 1998 (see pp 188–192, encl 6);

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(2) the first respondent continued to accept payment of salaries from the applicant for the months of September 1998 and October 1998 (up to 9 October) although she had purportedly been dismissed on 7 September 1998 (see p 191, encl 6).

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Briefly, at the Industrial Court, the issue that was raised by the applicant is as follows:

(2a) At the very outset, the bank will raise the preliminary objection that the claimant's representation under s 20 of the Industrial Relations Act 1967 was premature and accordingly, the instant action is null and void in law. The bank contends and will contend that the claimant failed to comply with s 20(1A) of the Industrial Relations Act 1967 in that the claimant's representation to the Industrial Relations Department of her purported constructive dismissal on 19 September 1998 ante-dated her subsequent claim of constructive dismissal (which is denied) on 25 September 1998.

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(2b) Further in support of the aforesaid objection, the bank contends and will contend that the claimant was paid her gross monthly salary of RM4,720 for the month of September 1998 and the sum of RM 1,370.32 for the period 2 October 1998 to 9 October 1998. Accordingly, the claimant remained an employee of the bank at all material times and particularly after her representation of constructive dismissal on 19 September 1998.

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(2c) It may also be noted that the claimant continued to occupy the residential premises provided to her (in her capacity as branch manager) by the bank at 2104B, First Floor, Jalan Sultan Ismail, 20200 Kuala Terengganu, Terengganu after 19 September 1998, and she continues to occupy the said premises to date. The claimant's occupation of the said premises post her representation on 19 September 1998 is therefore incompatible with her subsequent stand on 25 September 1998 that she has been constructively dismissed.

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(3) In the circumstances, the bank prays that the instant claim and the reference be dismissed *in limine*. A

(See the amended statement in reply, pp 163–164, encl 6).

The Industrial Court did not, however, see any merit in the applicant's stand and dismissed the preliminary objection. The relevant parts of the award may be summarized as follows: B

> A reading of s 20(1) clearly discloses that there is no requirement/duty stated therein for the workman who considers that he has been dismissed without just cause or excuse by his employer to communicate this fact to the employer.
>
> As such, the court therefore finds that there is no statutory requirement/ duty under s 20(1) of the Act or any other written law for the claimant to inform the bank that she had on 7 September 1998 considered herself constructively dismissed before making her representation to the department. It may have been prudent for her to have done so; it may even be argued that she was under a moral obligation to do so. The bank even argued that she was under a contractual obligation to do so but no evidence was led in regard to such an issue. As such, this court is unable to be persuaded by the bank that she is under a legal obligation to do so, and finds that the fact that she only informed the bank on 25 September 1998 (well after she had made her representation to the Department of Industrial Relations) as not invalidating her claim, to have been constructively dismissed on 7 September 1998' (see pp 333–334, encl 6). C D
>
> The court has perused the claimant's letters of reply to the show cause letters issued by the bank. The court finds that the first of these replies of the claimant (ie dated 11 September 1998) is a mere denial of the bank's allegations. It does not seek to actually 'show cause' at all. Neither in her second letter (ie dated 25 September 1998) does she 'show cause'. In fact, this second reply of the claimant touches upon her constructive dismissal and the representations that she had made to the department. The court finds that the two replies of the claimant, far from showing cause, are actually instruments of communication whose purpose is to inform and safeguard her interest. As regards the issue of salary, the claimant argued that this issue was a non starter because it was banked into her account without her solicitations' (see pp 334–335, encl 6). E F

The Industrial Court therefore essentially found that the first respondent's representation was not premature as she was not legally bound to inform the applicant that she deemed herself as having been constructively dismissed before she made the representation under s 20(1) read with s 20(1A) of the IRA. The court also found that the first respondent's subsequent conduct after her purported constructive dismissal was to be ignored in deciding whether or not her claim of constructive dismissal on 7 September 1998 could be sustained. G H

The Federal Court has recognized that the supervisory powers conferred on the High Court by virtue of s 25 of the Court of Judicature Act 1964 read with para 1 of the Sch are wide and all embracing (see *Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789). The ambit of the judicial review powers of the court was recently confirmed in the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama* I

Serbaguna Sungai Gelugor [1999] 3 MLJ 1 at p 45 where the Federal Court, speaking through Edgar Joseph FCJ, said:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* at p 70, '... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.'

The High Court is therefore empowered to strike down any decision of an inferior court, which in this case includes the Industrial Court, if it commits any errors of law. As to what amounts to 'errors of law', judicial guidance is to be found in the landmark Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 at p 342 where Gopal Sri Ram JCA expressed the following view:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he miscontrues the terms of any relevant statute, or misapplies or mis-states a principle of general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

This statement of principle was expressly approved by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1994] 3 MLJ 369 at p 390. The classic enunciation of the grounds on which errors of law are committed by an inferior tribunal, and thus necessitating the curial intervention of the High Court was by Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at pp 410–411. It is as follows:

> By illegality ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it ... by 'irrationality' I mean what can now be succinctly referred to a 'Wednesbury unreasonableness' ... It applies to decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... I have described the third head as 'procedural impropriety' rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

It is pertinent to note also that the scope of judicial review has been expanded by the decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 where the Federal Court held that when a decision is challenged as being in error of law on the grounds of irrationality or illegality, the supervisory court is empowered to review the decision not merely for process but for substance as well (see also *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489). Hitherto, the position was that judicial review concerns only the decision making process and not the substance or the merits of the decision. This approach has been jettisoned by the Federal Court (see also *Amanah Butler v Yike Chee Wah* [1997] 1 MLJ 750).

Grounds in paras 4(1), (6), (7) and (8), encl 7

As a starting point, it is necessary to consider s 20(1) and 20(1A) of the IRA. They read as follows:

> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (1A) The Director General shall not entertain any representations under sub-s (1) unless such representations are filed within sixty days of the dismissal.

Please note that s 20 of the IRA applies both to cases of outright dismissals and constructive dismissals (see *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 at p 149). In the context of the instant case before the court, it is crucial that the following points be noted:

(1) under s 29(1) of the IRA, a workman must first be 'dismissed' without just cause or excuse before he may make representations to the Director General of Industrial Relations. There must therefore be an act/event amounting to a dismissal of the employee (workman) and only then she would have the legal right under the statute to make the requisite representation;

(2) the legislative intent that there should be a dismissal before the representation is also found in s 20(1A) which requires the representation to be made 'within 60 days of the dismissal'.

The statutory regime housed in s 20(1) and 20(1A) of the IRA clearly prescribes the 'dismissal before representation' formula. Accordingly, where a representation is made before, or precedes, the dismissal, the representation would in law be premature, null and void. Where a representation is premature, the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal based on the representation. This was decided in the case of *Supermix Concrete (M) Bhd v Teoh Boon*

Beng (1978) 1 ILR 274. In that case, the dismissal was to take effect on 26 March 1986 but the employee made his representation under s 20(1) on 27 February 1986, ie before the dismissal. The Industrial Court held that the representation was premature as it preceded the dismissal and thus it did not have jurisdiction to hear the matter. The claim was struck off. Please note that the Industrial Court's decision in the *Supermix* case was upheld on appeal by the Supreme Court as confirmed in the case of *Shaw Computers* [1989] 1 ILR 261. The following parts of the *Supermix* decision are important to appreciate the jurisdictional importance of the 'dismissal before representation' formula stipulated in s 20(1) of the IRA:

> Section 20(1) of the Act envisages a situation that the workman has already been dismissed and it follows from the phrase 'to be reinstated in his former employment' and this is followed by another phrase 'from which the workman was dismissed.
>
> Section 20(1) is very clear and the court will have to give effect to it, no matter how unjust or unconscionable the result would be.
>
> The phrase 'within thirty days of the dismissal' is the operative phrase in this Section. It stipulates the time by which the representation is to be made, ie thirty days after the dismissal. The word 'dismissal' is the key word to this phrase as the concept of effective date of dismissal is very important in that it indicates when the workman is to make the representation and also the time starts to run from that effective date of dismissal.
>
> (Please note that the 'thirty days' requirement has now been replaced by 'sixty days' in s 20(1A) of the IRA by Act A 718).
>
> The provision of s 20(1) of the Act has been strictly interpreted, and it follows, therefore the claimant should in this case make his representation 'after the dismissal'.
>
> From the circumstances of this case and in the strict interpretation of s 20(1) of the Act, the claimant was not yet dismissed, therefore his representation was premature, within the working period, and as such the court is not seized with jurisdiction.

The Industrial Court correctly accepted that it would have no jurisdiction to hear a premature claim. This is what the court said:

> Counsel for the Bank did refer to the decision of *Supermix Concrete (M) Sdn Bhd v Teoh Boon Beng* [1987] 1 ILR 264 in which it was held that the court had no jurisdiction to entertain a premature representation. This decision was applied and followed in the following cases — *Company Du Combidge Kedah v Sinnaperumal all Munusamy, Kedah* (1988) 2 ILR 212, *Show Computer and Management Services Sdn Bhd v Cheong Kiew* [1989] ILR 261 and *Grafikopm (M) Sdn Bhd v Lee Mun Wai* [1988] 1 ILR 382.
>
> The law is therefore well stated and if the court finds that the claimant did in fact make a premature representation that it has to allow the preliminary objection. The question therefore that have to be determined by the court would be as to when the claimant considered herself constructively dismissed and when she made the representation to the department.

However, the Industrial Court found that the first respondent's claim in the instant case was not premature. This finding is found at p 336, encl 6:

> The court is satisfied that the claimant did claim to have been constructively dismissed on 7 September 1998, which date preceded her representations to the department on 19 September 1998.

I am of the opinion that the Industrial Court acted in error of law and in excess of jurisdiction when it decided that the first respondent's claim was not premature. The sole basis for its finding is found at pp 331–332, encl 6, and it reads:

> The claimant refers to the letter dated 27 August 1999 from the department of Industrial Court in which the minister referred the claimant's representation to the court under s 20(3) for a decision. This letter which is exh NKL-1 of the amended statement of case, is headed as follows:
>
> > 'Rujukan ke Mahkamah Perusahaan oleh YB Menteri Sumber Manusia Mengenai Pembuangan Kerja Cik Ng Keng Lian, 1829, Jalan 11, Taman Padang Maidin, 21400 Kuala Terengganu, Terengganu oleh Southern Bank Bhd, 104A & B, Jalan Sultan Ismail, 20200 Kuala Terengganu, Terengganu pada 7 September 1998.'
>
> Paragraph 2 of that letter specifically states that the claimant's representations were received by the Industrial Relations Department on 19 September 1998. The representations were made under s 20(1) of Act 177 in regard to her claim to have been constructively dismissed, 7 September 1998.

In arriving at this conclusion, the Industrial Court failed to take into account the following undisputed facts which plainly vitiates the finding that the first respondent was constructively dismissed on 7 September 1998:

(1) there was no document or letter at all from the first respondent — employee to the applicant — where she took the stand that she was constructively dismissed on 7 September 1998;

(2) the first respondent in fact took the position for the first time that she was constructively dismissed on 25 September 1998 in her letter of the same date (se p 22, encl 6). The Industrial Court completely ignored the legal effect of this letter which clearly fixes the date of the purported constructive dismissal at 25 September 1998. And, it is all the more incredible that the Industrial Court should disregard this letter given that this was the only document emanating from the first respondent where she makes her stand clear on the matter;

(3) the first respondent's conduct in responding to the show cause letters on 20 September 1998 and 22 September 1998 (see her letters at pp 30–31, encl 6) was also inconsistent with her stand that she was constructively dismissed on 7 September 1998. An employee who considers herself as having been constructively dismissed would not be replying to show cause letters at all. Indeed, an employee who is no longer in the employ of an employer, or who considers herself to be no longer in the employ of the employer, is not subject to any form of disciplinary process (eg show cause letters) initiated by the employer (see *SP Tiwari v State of Bihar* [1993] II LLJ 1162 at pp 1163–1164;

(4) if the first respondent considered herself constructively dismissed from 7 September 1998, why did she continue to occupy the residential premises provided by the bank, as well as receive salary well after 7 September 1998?

I think that there was sufficient evidence before the Industrial Court for it to have found that the first respondent had only deemed herself as having been constructively dismissed on 25 September 1998. It was also clear, as a matter of law, that the first respondent could not have deemed herself as having been constructively dismissed on 7 September 1998. Thus, the only reasonable finding that the Industrial Court could have arrived at on the totality of the evidence placed before it would have been that she had in fact only considered herself as having been constructively dismissed on 25 September 1998. It is well established that in judicial review proceedings, the High Court can disagree with the Industrial Court on the conclusions or inferences drawn by the Industrial Court from the evidence placed before it on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion. This principle was restated recently by the Court of Appeal in *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh s/o Chingar Singh* [2000] 3 MLJ 714 at p 722 as follows:

> On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference from proved or admitted facts is an error of law; not an error of fact. If authority is required for that proposition it may be found in the judgment of Gill J (later CJ (Malaya)) in *Govinda Mudaliar & Sons v Govindasamy* [1967] 2 MLJ 5.

The earlier Court of Appeal decision of *Amanah Butler* at p 760 also has reference. I am of the opinion that the Industrial Court's finding that the first respondent had deemed herself as having been constructively dismissed on 7 September 1998 was an erroneous factual conclusion on the totality of the evidence placed before it. It was also a conclusion that is not reasonably supported by the evidence taken as a whole. On either base, the finding is unsustainable. Authority for these propositions are found in the judgment of Edgar Joseph Jr FCJ in *Rama Chandran*'s case (at p 224):

> However, like most principles, there are important exceptions, which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned; they are:
>
> (i) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374. Indeed, in *R v Hillingdon LBC, ex p Puhlhofer,* Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'.

(ii) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v Bairstow* [1956] AC 14; *Din (Taj) v Wandsworth LBC* at p 664H, per Lord Wilberforce; *R v Hillingdon LBC; ex p Islam (Tafazzul)* [1983] 1 AC 688 at p 708D, per Lord Wilberforce and at p 717G, per Lord Lowry).

But, as Wade and Forsyth's *Administrative Law* (7th Ed, 1994) have correctly pointed out at p 312:

> '"No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allison v General Council of Medical Education and Registration* [1894] 1 QB 754 at pp 760, 763; *Lee v The Showmen's Guild of Great Britain* [1951] QB 319 at p 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence (see *R v Roberts* [1908] 1 KB 407 at p 423). This "no evidence" principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.'

It is, therefore, that I come to the conclusion that the Industrial Court should have found in the instant case that the first respondent's purported constructive dismissal was with effect from 25 September 1998. Accordingly, it would follow, and the Industrial Court should have held, that her representation on 19 September 1998 was premature as it ante-dated her claim of constructive dismissal of 25 September 1998. It was therefore open to the Industrial Court to hold that it did not have jurisdiction to hear the first respondent's premature claim and the claim ought to have been struck off *in limine*. Its failure to do so was an error of law.

Grounds in paras 4(2), (3), (4) and (5), encl 7

Next, the Industrial Court, having erroneously held that the first respondent had considered herself as having been constructively dismissed on 7 September 1998 and thus having erroneously assumed jurisdiction, went on to decide that she was not obliged in law to inform the applicant (her employer) of her stand (that she was purportedly constructively dismissed on 7 September 1998) before she made the representation on 19 September 1998. This is found at pp 333–334, encl 6 and it may be recalled that the Industrial Court said:

> As such, the court therefore finds that there is no statutory requirement/duty under s 20(1) of the Act or any other written law for the claimant to inform the bank that she had on 7 September 1998 considered herself constructively dismissed before making her representation to the department. It may have been prudent for her to have done so; it may even be argued that she was under a moral obligation to do so. The bank even argued that she was under a contractual obligation to do so, but no evidence was led in regard to such an issue. As such, this court is unable to be persuaded by the bank that she is under a legal obligation to do so, and finds that the fact that she only informed the bank on 25 September 1998 (well after she had made her representation to the Department of Industrial Relations) as not invalidating her claim, to have been constructively dismissed on 7 September 1998.

A It may be noted that before arriving at the conclusion above (at pp 333–334, encl 6), the Industrial Court correctly accepted that the legal test for constructive dismissal in Malaysia was the common law 'contract test'. This is seen at p 300, encl 6:

> The claimant referred to the Federal Court case of *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92 and the Court of Appeal cases of *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137, and *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599, which concisely state the law regarding constructive dismissal. Suffice to say the test in regard to the constructive dismissal is now the contract test, ie 'whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.

B

C

However, the Industrial Court then erroneously refused to apply the contract test to the issue before it, namely whether notice to the employer of the purported constructive dismissal was required under s 20(1) read with 20(1A) of the IRA before the representation can be made. This is found at p 330, encl 6:

D

> Having regard to the limited scope permitted in regard to preliminary objections, the court rejects the argument that for the purposes of deciding on the preliminary objection, it should at this stage also determine whether the elements of the contract test were met.

E

The Industrial Court then embarked on a very literal and ultimately superficial approach to the issue and held that:

> A reading of s 20(1) clearly discloses that there is no requirement/duty stated therein for the workman who considers that he has been dismissed without just cause or excuse by his employer to communicate this fact to the employer.

F

By first accepting that the contract test was applicable to constructive dismissal cases, and then by declining to apply the established principles under the test to the issue before it, the Industrial Court took a mutually G contradictory stand. In the result, there was a fundamental error of law and jurisdiction in the approach adopted by the Industrial Court that vitiated its award. I am of the opinion that the word 'dismissed' in s 20(1) of the IRA includes 'constructive dismissal' (see again *Pan Global*'s case). And, in determining questions on a constructive dismissal under s 20(1) of the IRA, common law principles, viz, the contract test as propounded in *Wong Chee* H *Hong*'s case, are to be applied. This was made clear in the case of *Holland v Glendale Industries Ltd* [1998] 1 ICR 493 at p 497 in the equivalent provision in England where it was said:

> In our view, however, s 95(1)(c) must be considered in the light of the ordinary principles of contract.

I

This position was reiterated in *Chirstoph Hoelzl v Langkawi Island Resort Sdn Bhd* [1998] 6 MLJ 162 at p 167 where it was stated:

> The common law recognises the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer (see *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92). In the same case, the (then) Supreme Court also decided that the word 'dismissal' in s 20 of the Industrial Relations Act 1967 should be interpreted with reference to the common law principle, viz:
>
> > We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v The Ottoman Bank* [1930] AC 271 and *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486).

It may be noted that the common law contract test was accepted as the correct test for cases of constructive dismissal by the Court of Appeal in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 at pp 605–606. This is what the Court of Appeal said (per Mahadev Shankar JCA):

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.' (See *Holiday Inn, Kuching v Elizabeth Lee Chai Siok* [1992] 1 MLJ 230 and *Wong Chee Hong v Cathay Organization (M) Sdn Bh*d [1998] 1 MLJ 92 at p 94).

Please note that the decision of the Court of Appeal in *Anwar bin Abdul Rahim* was upheld on appeal by the Federal Court as confirmed in *Funai Electric (M) Sdn Bhd v Saliah bte Ahmad* [2000] MLJU 132 at p 133.

As the common law contract test is applicable to all cases of constructive dismissal, it was incumbent on the Industrial Court to apply the test for the purposes of determining the issue before it. In doing so, the approach that the Industrial Court should have taken is to ask itself whether under the common law contract test there was a duty on the employee to inform her employer that she deemed herself as having been constructively dismissed before she made the representation. I think that the failure on the part of the Industrial Court to distill the correct principles and apply them to the issue before it by asking itself the correct question was patently an error of law. The Court of Appeal said so in the *Syarikat Kenderaan Melayu Kelantan Bhd* case, at p 342:

> But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations, or omits to take into account relevant consideration, ... or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

Under the common law contract test to be applied in constructive dismissal cases, the question for the court to determine is whether the employer is guilty of a breach which goes to the root of the contract of employment or whether the employer has evinced an intention no longer to be bound by the contract of employment. If the answer is in the affirmative in either case, then the employer is said to have repudiated the contract of employment and the employee would be entitled to regard herself as having been constructively dismissed (see *Wong Chee Hong*'s case). However, for the employee to reply on the repudiatory breach of the employer and deem herself constructively dismissed, she must first inform the employer by words or conduct, or both, that she was accepting the repudiation and treating the contract of employment as having been terminated by the employer. In the case of *Holland v Glendale Industries Ltd*, the failure on the part of the employee to inform the employer that he considered himself as having been constructively dismissed proved fatal to the claim. The ratio of the case may be culled from the headnotes (at p 493) and it reads as follows:

> ... where one party to a contract by his conduct repudiated the contract and the other wished to rely on such repudiation, the latter must by words and/or conduct make it plain that he was accepting the repudiation; ... accordingly, an employee who did not make it clear to his employers that he was leaving their employment because of their conduct towards him was not constructively dismissed within the meaning of that subsection;

Thus, under the common law contract test it is a legal requirement in constructive dismissal cases for the employee to inform her employer that she deemed herself as having been constructively dismissed before she initiated any action against the employer. This basic principle was recently restated in the important case of *Edwards v Surrey Police* (1999) IRLR 456 as follows:

> Before a contract of employment can be terminated, there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is at an end. An employee alleging constructive dismissal, therefore, must communicate to the employer the fact that they are terminating their employment. It is not an infrequent occurrence that employees find their working life intolerable, walk out in a huff, but do not intend to bring their employment relationship to an end. Unless there has been a proper communication by the employee of the fact that they are regarding themselves as no longer employed, whether by words or conduct, their employment relationship has not terminated.

The principle was also fully explained in the body of the judgment as follows:

> That argument was firmly rejected and (if we might say so with respect) rightly so, on the basis that, as Mr Linden so happily put it, the statutory definition of the effective date of termination, and when a termination takes effect, is not to be surrounded by the subtleties of the law of contract on these sort of issues. But it does not follow that because the doctrine of repudiation and acceptance may not fit in easily with the termination of an employment relationship, a communication of a termination is not a prerequisite to the termination of a contract of employment.

> It seems to us perfectly clear, as a matter of general principle that before a contract of employment can be terminated there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is indeed at an end.

In the local case of *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 CLJ 475 at p 496, the High Court also accepted that there was a legal requirement to inform the employer before the employee walks out claiming constructive dismissal.

In *Pexxon Sdn Bhd v Sia Qui Yau, Johor* (1989) 1 ILR August 235, the Industrial Court once again applied the case of *Wong Chee Hong* and concluded as follows (see p 240 of the report):

> So the length of time is a crucial factor by which the claimant must act to repudiate the contract based on the breach, that goes to the root of that contract. The period of one month has been held to be unreasonable for the claimant not to have acted against his employer. It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. All this is to be decided on the facts of each case.

It is therefore clear that it was necessary for the first respondent to have first informed the applicant of her stand before she made the representation. Otherwise, as a matter of law, the employment relationship would not have terminated. In *Edward*'s case, the court emphasized the requirement of notice to the employer, before the employment contract may be treated as terminated, as follows:

> It seems to us that employers should know where they stand when an employee leaves. In this case, the employers appear to have written a letter which was, at the least, compatible with the employment relationship continuing until the date when they received the letter from the employee. It is not an infrequent occurrence that employees find their working life intolerable, walk out in a huff, but do not intend to bring their employment relationship to an end. It seems to us that, unless there has been a proper communication from the employee of the fact that they are regarding themselves as no longer employed, whether by words or conduct, their employment relationship had not terminated.

Thus, when the first respondent made the representation on 7 September 1998 without having first informed the applicant of her stand, she could not in law claim to have been constructively dismissed. Her claim was only with effect from 25 September 1998, by which time she had made the representation. The representation was therefore premature. I therefore come to the conclusion that the Industrial Court did not properly direct itself on the law when it decided that there was no duty on the part of the first respondent to inform her employer that she considered herself as having been constructively dismissed before she made the representation. The decision of the Industrial Court was therefore unreasonable in the '*Wednesbury* sense' and cannot be sustained. The 'unreasonableness' here

A was explained in the Supreme Court case of *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 422 as follows:

> So is Lord Greene MR's speech in the *Wednesbury Corp* case at p 229, explaining the meaning of 'unreasonableness' in its broad or comprehensive sense.
>
> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty — those of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have been all referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonableness'.
>
> It is true the discretion must be experienced reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. *For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'*. (Emphasis added.)

Accordingly, the finding of the Industrial Court that there was no legal requirement for the first respondent to have informed the applicant of her stand, that she was constructively dismissed, before she made the representation, was flawed and devoid of any plausible justification. It cannot therefore be sustained and must be quashed. I also rely on the Federal Court case of *Wong Yuen Hock v Syarikat Hong Leong Assurance* [1995] 2 MLJ 753 for the following legal proposition at p 757:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916), and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100.

In the ultimate analysis, the decision of the Industrial Court on the issue before it was clearly irrational, illegal and a nullity as it:

(i) failed to properly address its mind to the sole issue at hand;

(ii) failed to consider the evidence in its totality when it decided that the claim was premature; and

(iii) failed to distill the correct legal principles under the contract test for constructive dismissal cases and apply the principles to the issue in question.

For these reasons, I grant order in terms of (a) of encl 8 and costs.

Application allowed.

Reported by Lim Lee Na